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such considerations should be admissible against the corporation in a presidential action at the court's discretion.⁵³



COURTS — FEDERAL JURISDICTION — LIMITS ON DISCRETION OF DISTRICT COURT IN DIVERSITY CASE RELATING TO PROBATE AND ADMINISTRATION. — Plaintiff, beneficiary of a testamentary trust, brought an action in the District Court for the Northern District of New York, seeking, *inter alia*, damages for breach of trust and a construction of the will of the testatrix to declare plaintiff the owner of certain stock. The district court declined jurisdiction although there was diversity of citizenship. In reversing in part and affirming in part the order of the district court, the Court of Appeals for the Second Circuit *held* that while the district court was correct in disavowing jurisdiction over part of plaintiff's claim, it had no discretion to decline jurisdiction of those claims of plaintiff that would not interfere with the previously attached quasi in rem jurisdiction of the state surrogate's court, notwithstanding the fact that the estate was still in administration. *Beach v. Rome Trust Co.*, 269 F.2d 367 (2d Cir. 1959).

Plaintiff's complaint in the case presented an opportunity for the Court to consider many of the problems of federal jurisdiction over claims against decedents' estates, *i.e.*, to what extent do federal courts, sitting in equity, have subject matter jurisdiction over such matters, the effect of state law on such jurisdiction and the discretionary power of the federal court to decline the exercise of jurisdiction otherwise existing. Actions in federal courts affecting decedents' estates present jurisdictional questions in more than one sense of that term. A district court's jurisdiction is both defined and limited by the statute that grants it.¹ Also in entertaining actions against executors and administrators the district court is sitting as a court of equity, and the considerations that govern equity's subject matter jurisdiction apply.² Finally, in the area under discussion, the jurisdiction of the federal court is limited by the principles of comity which obtain when courts of concurrent jurisdiction entertain actions respecting the same subject matter.³

⁵³ Cf. *Tidy-House Paper Co. v. Adlman*, *supra* note 52. A final consideration is that the use of the presidential suit by unscrupulous presidents may lead, as in the case of minority stockholders' suits, to oppressive legislation which would make legitimate and sincere presidential interference difficult.

¹ Actions based on diversity of citizenship, 28 U.S.C. § 1332 (1958), constitute the bulk of litigation that will be considered.

² See generally *Case of Broderick's Will*, 88 U.S. (21 Wall.) 503 (1874).

³ See 1 MOORE, FEDERAL PRACTICE ¶ 0.222 (2d ed. 1959).

It is often said that the federal courts have no jurisdiction over matters of a purely probate or administrative nature.⁴ This is so because the district court, sitting in equity, has a subject matter jurisdiction co-extensive with that possessed by the English High Court of Chancery at the time of the passage of the Judiciary Act of 1789,⁵ and the administration of decedents' estates was not within the jurisdiction of that court.⁶ The strict probate over which equity has no jurisdiction involves that class of cases which seek to establish the validity vel non of a will or set aside its probate.⁷ Historically, these are in rem proceedings⁸ which do not necessarily involve a controversy between parties,⁹ but establish status and are conclusive on the world.¹⁰ The class of cases within federal equity jurisdiction are those inter partes actions by creditors,¹¹ heirs¹² and others¹³ seeking to establish claims against the estate. The question then arises as to what extent state law can modify the existence of federal equity jurisdiction over the above described cases. The basic test of in rem versus inter partes remains the same,¹⁴ and state law is only relevant insofar as it changes the basic form of an action. If a right, the remedy for which is classically found in strict probate, is enforceable in a particular state by a plenary suit inter partes, then the same remedy is available in the district court sitting within the state, in a diversity case.¹⁵ The most reliable test of the existence of an in personam remedy for a right within the first class is the availability of an action in the state court of general equity jurisdiction.¹⁶ The cases often apply this test mechanically without reference to the theoretical justification for its application,¹⁷ and while this does not

⁴ See *Markham v. Allen*, 326 U.S. 490, 493-94 (1946); *Fouvergne v. City of New Orleans*, 59 U.S. (18 How.) 470 (1855).

⁵ 1 Stat. 73 (1789). See *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909); *Payne v. Hook*, 74 U.S. (7 Wall.) 425 (1868).

⁶ See *Markham v. Allen*, *supra* note 4, at 494; *Farrell v. O'Brien*, 199 U.S. 89, 103-04 (1905).

⁷ *Case of Broderick's Will*, 88 U.S. (21 Wall.) 503 (1874); *Lanham v. Howell*, 203 F.2d 361 (5th Cir. 1953).

⁸ *Beyers v. McAuley*, 149 U.S. 608 (1893); *Case of Broderick's Will*, *supra* note 7.

⁹ *Case of Broderick's Will*, *supra*, note 7.

¹⁰ *Blacker v. Thatcher*, 145 F.2d 255 (9th Cir. 1944), *cert. denied*, 324 U.S. 848 (1945); *Strickland v. Peters*, 120 F.2d 53 (5th Cir. 1941).

¹¹ *Farmers' Bank v. Wright*, 158 Fed. 841 (C.C.N.D. Iowa 1908).

¹² *Miami County Nat'l Bank v. Bancroft*, 121 F.2d 921 (10th Cir. 1941); *Harrison v. Moncravie*, 264 Fed. 776 (8th Cir. 1920).

¹³ *Markham v. Allen*, 326 U.S. 490 (1946); *United States v. Peoples Trust & Savings Co.*, 97 F.2d 771 (7th Cir. 1938).

¹⁴ *Beach v. Rome Trust Co.*, 269 F.2d 367, 371 (2d Cir. 1959).

¹⁵ *Sutton v. English*, 246 U.S. 199, 205 (1918); *Ellis v. Davis*, 109 U.S. 485, 494-97 (1883).

¹⁶ *Sutton v. English*, *supra*, note 15; *Farrell v. O'Brien*, 199 U.S. 89 (1905); *Mitchell v. Nixon*, 200 F.2d 50 (5th Cir. 1952); *Jackson v. United States Nat'l Bank*, 153 F. Supp. 104, 112-13 (D. Ore. 1957).

¹⁷ *E.g.*, *Illinois State Trust Co. v. Conaty*, 104 F. Supp. 729 (D.R.I. 1952).

lead to error in the class of cases to which it properly applies, such as proceedings to establish the validity or invalidity of a will¹⁸ or to set aside a probate,¹⁹ an important distinction must be made when the second class of cases²⁰ are considered. As to these inter partes actions, assuming that their nature as such is preserved by state law,²¹ the internal jurisdictional arrangements that may be made by a state which, for the more convenient settlement of decedents' estates, may vest exclusive jurisdiction of all matters affecting the estate in a probate court, cannot affect federal jurisdiction.²² Manifestly the application here of a mechanical test of whether a particular action is maintainable in a state court of general jurisdiction would do violence to the basic distinction of an inter partes action versus a direct in rem proceeding, the very concept, the application of which, the test was designed to facilitate.²³ Of course if *no* court in a particular state will provide an inter partes remedy, then even if the action is otherwise within the ordinary federal equity subject matter jurisdiction and diversity exists, jurisdiction must still be disavowed under the doctrine of *Guaranty Trust Co. v. York*.²⁴

Assuming that the jurisdiction of a federal court, over a claim against an estate in the process of administration in a state probate court, is otherwise unimpaired, it operates subject to the principal of comity.²⁵ The federal court may not entertain an action that will interfere with the possession of a res by a state court.²⁶ This prin-

"In each case the jurisdictional question can be decided by determining whether the action could be maintained in a state court of general jurisdiction in the state where the federal court sits." *Id.* at 731; *Foster v. Carlin*, 200 F.2d 943, 947 (4th Cir. 1952).

¹⁸ *Mitchell v. Nixon*, *supra*, note 16; *Heath v. Jones*, 168 F.2d 460 (5th Cir. 1948).

¹⁹ *Farrell v. O'Brien*, *supra*, note 16.

²⁰ This class consists of the inter partes actions referred to in the text accompanying notes 11, 12 and 13 *supra*.

²¹ See note 24 *infra* and accompanying text.

²² *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909); *Payne v. Hook*, 74 U.S. (7 Wall.) 425 (1868); *Blacker v. Thatcher*, 145 F.2d 255, 257 (9th Cir. 1944), *cert. denied*, 324 U.S. 848 (1945). The requirement of "substantially similar result" demanded by *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), is met since it is not suggested that the federal court action would produce a different result than the state probate court. *Beach v. Rome Trust Co.*, 269 F.2d 367, 373 (2d Cir. 1959). See also 1 MOORE, FEDERAL PRACTICE ¶ 0.222 (2d ed. 1959).

²³ There are broad dicta in some cases that betray a misapprehension of the true nature of the test. *Foster v. Carlin*, 200 F.2d 943, 947 (4th Cir. 1952); *Galion Iron Works & Mfg. Co. v. Russell*, 167 F. Supp. 304, 312 (W.D. Ark. 1958).

²⁴ 326 U.S. 99 (1945); *accord*, *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Jackson v. United States Nat'l Bank*, 153 F. Supp. 104, 111 (D. Ore. 1957).

²⁵ See *Byers v. McAuley*, 149 U.S. 608, 614-17 (1893); Note, 43 HARV. L. REV. 462 (1930).

²⁶ *Ibid.* See 1 MOORE, FEDERAL PRACTICE ¶ 0.214 (2d ed. 1959).

cial is one of necessity and leaves nothing to the discretion of the federal court.²⁷ Where, however, a plaintiff seeks merely an in personam remedy that can be given without interference with the res, the previously attached in rem or quasi in rem jurisdiction of the state is no barrier to the concurrent federal action,²⁸ even though the latter adjudicates a right in an estate without assuming physical control.²⁹ Where the relief sought is partly within the prohibition of non-interference "the federal court should proceed to grant any relief appropriate under the pleadings which will not interfere with the specific properties . . . within the jurisdiction of the state courts."³⁰ In keeping with the limits above described, execution may not be issued on the district court's decree, but it must take its place with other established claims against the estate in the custody of the state court,³¹ the latter being bound by the federal decree.³²

Lastly, it may be asked that, admitting that federal courts are not prohibited from assuming jurisdiction over in personam claims against decedents' estates, do they have discretion to decline its exercise? It seems not. Despite the disinclination to "do justice by halves"³³ the weight of authority indicates that the diversity

²⁷ *Palmer v. Texas*, 212 U.S. 118 (1909). "If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectively as if the property had been entirely removed to the territory of another sovereignty." *Id.* at 125. *Accord*, *Penn. Gen. Cas. Co. v. Pennsylvania*, 294 U.S. 189 (1935); *Kittredge v. Stevens*, 126 F.2d 263 (1st Cir. 1942), *cert. denied*, 317 U.S. 642 (1942).

²⁸ *Markham v. Allen*, 326 U.S. 490 (1946); *Schram v. Poole*, 97 F.2d 566 (9th Cir. 1938); *United States v. Peoples Trust & Savings Co.*, 97 F.2d 771 (7th Cir. 1938).

²⁹ *Ibid.* In regard to actions for an accounting a distinction can be made between an accounting aimed at a distribution of assets, and one merely in aid of a plaintiff's claim to property. See *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), the latter not being an interference with a state court's possession of a res. *Hall v. Cottingham*, 55 F.2d 659 (E.D.S.C. 1931), *aff'd*, 55 F.2d 664 (4th Cir. 1932). However, the weight of authority indicates that any accounting would constitute an interference. See *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 45 (1909); *Beyers v. McAuley*, 149 U.S. 608 (1893); *Beach v. Rome Trust Co.*, 269 F.2d 367 (2d Cir. 1959).

³⁰ *Purcell v. Summers*, 126 F.2d 390, 395 (4th Cir.), *cert. denied*, 317 U.S. 640 (1942); *accord*, *Waterman v. Canal-Louisiana Bank & Trust Co.*, *supra*, note 29; *Beach v. Rome Trust Co.*, *supra*, note 29; see *Markham v. Allen*, *supra*, note 28. *But see* *Haines v. Carpenter*, 91 U.S. 254 (1875); *Jackson v. United States Nat'l Bank*, 153 F. Supp. 104 (D. Ore. 1957).

³¹ *Yonley v. Lavender*, 88 U.S. (21 Wall.) 276 (1874); *Farmers' Bank v. Wright*, 158 Fed. 841, 849 (C.C.N.D. Iowa 1908).

³² *Markham v. Allen*, 326 U.S. 490, 494 (1946).

³³ In *Jackson v. United States Nat'l Bank* *supra*, note 30, the court declined jurisdiction of an in personam claim because the principal relief sought was without federal equity jurisdiction. *Accord*, *Haines v. Carpenter*, *supra*, note 30. *But see* *Underground Electric Rys. v. Owsley*, 169 Fed. 671 (C.C.S.D.N.Y.), *aff'd*, 176 Fed. 26 (2d Cir. 1909). See note 30 *supra*.

suitor, asserting in personam claims against executors and administrators, may not be turned away,³⁴ at least when his in personam claims are not merely incidental to non-cognizable main relief.³⁵

While it has been stated that if the issue were one of first impression, the better rule would be to remit the diversity suitor to his remedy in the pending state probate proceeding³⁶ because the exercise of federal jurisdiction in such a case "smacks of gratuitous interference rather than of the spirit of comity which ought to obtain between courts of independent and coordinate jurisdictions,"³⁷ it has been recognized that the weight of authority is otherwise.³⁸

The Court in the principal case decided correctly in affirming the district court's rejection of those claims of plaintiff that would require relief constituting an interference with the surrogate's court. However, the theoretical justification for its holding that the district court erred in declining jurisdiction over the remainder of plaintiff's claims is somewhat less compelling but is nevertheless within the traditional authority in the area. In addition, the practical wisdom of a holding that the district court has no discretion to remit a diversity suitor to the state forum uniquely endowed with the adequate judicial machinery to do complete justice to all concerned with decedents' estates is seriously to be questioned in view of the fact that the federal court is not being called upon to disavow jurisdiction, but merely to decline its exercise in appropriate circumstances.



CRIMINAL LAW—GRAND JURY—INQUIRY THROUGH MEDIA OF SIMPLE QUESTIONNAIRE IS A MEANS APPROPRIATE TO EXPRESS POWER OF INVESTIGATION.—Relator, an inspector employed by the New York Department of Buildings, was subpoenaed by a Grand Jury investigating alleged bribery and extortion with regard to public employees. After executing a waiver of immunity, he appeared before that body and, upon the advice of counsel, refused to fill out and return a simple financial questionnaire. Having been adjudged guilty of criminal contempt, he applied to the Appellate Division,

³⁴ *Beach v. Rome Trust Co.*, 269 F.2d 367 (2d Cir. 1959); *Blacker v. Thatcher*, 145 F.2d 255 (9th Cir. 1944), *cert. denied*, 324 U.S. 848 (1945); *Harrison v. Moncravie*, 264 Fed. 776, 779 (8th Cir. 1920); *United States v. Swanson*, 75 F. Supp. 118, 122-23 (N.D. Neb. 1947), *appeal dismissed*, 171 F.2d 718 (8th Cir. 1949); *Farmers' Bank v. Wright*, 158 Fed. 841, 850 (C.C.N.D. Iowa 1908).

³⁵ See note 34 *supra*.

³⁶ *Blacker v. Thatcher*, *supra* note 34, at 257.

³⁷ *Ibid.*

³⁸ *Ibid.* See note 34 *supra*.